Contemporary Slavery and its Definition in Law

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Had Olaudah Equiano, Abraham Lincoln or William Wilberforce been able to look into the future, to the twenty-first century, what they may have been most struck by was not how far we had come in ending slavery and suppressing human exploitation, but that we had yet to agree on what in fact the term 'slavery' means. This is a rather intriguing puzzle, as a consensus has existed for more than eighty-five years amongst States as to what the legal definition of slavery is. Yet, that definition has failed to take hold amongst the general public or to 'speak' to those institutions interested in the ending of slavery.

At first blush, this is not so hard to understand as the definition, drafted in the mid-1920s by legal experts, is rather opaque and seems to hark back to a bygone era. The definition found in the 1926 Slavery Convention reads: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised". At first sight, the definition really does not convey much to the reader, but for the fact that it *appears* to require that a person own another. As the ownership of one person by another has been legislated out of existence – again – *it appears* that this definition would have no traction in the contemporary world. Yet, this is not so, as the legal definition of slavery established in 1926 has been confirmed twice, by having been included in substance in both the 1956 Supplementary Convention, and more recently in the 1998 Statute of the International Criminal Court. Further, the definition's contemporary relevance has been validated by international courts and been given its most in-depth consideration by the High Court of Australia in the 2008 *Tang* case. Thus, we know that the definition holds, but what we do not truly know is what it means.

This Chapter seeks to unpack the 1926 definition of slavery to demonstrate the manner in which it can and should be read so as to give it substance both as a legal tool, to assist in the prosecution of individuals involved in enslaving others, but also as an advocacy tool meant to aid in bringing contemporary slavery to the forefront of public consciousness; suppressing slavery, and assisting the victims. In a rather counter-intuitive manner, this Chapter starts unpacking the definition by providing guidance as to how the property paradigm of the definition can be translated so as to reflect both the lived experiences of slaves and to provide the legal parameters, so as to give the term slavery legal certainty. That is to say: it provides a manner to read the definition and apply it. The Chapter then works backwards in time, putting in place the background and evolution which allows for this contemporary understanding by further unpacking the 1926 definition and considering its various elements with reference to the *Tang* judgment. The Chapter then concludes by going back further in time and considering the evolution of the 1926 definition to show the dynamics which have been at play, which first marginalised its use but later breathed new life into the definition. In setting out this Chapter in this manner, it will read like a 'how to' manual, giving the reader both the ability to understand what slavery means in legal terms and – if need be – to follow through a genealogy which explains how one gets to this point of providing an understanding of the term slavery which has contemporary relevance.

Understanding the Definition of Slavery

Over a two year period, from 2010 through 2011, more than a dozen experts in the area of slavery and the law came together to develop 'The International Guidelines on the Legal Parameters of Slavery'. This Research Network, established through funding of the United Kingdom's Arts and Humanities Research Council was built on three pillars, personified by Professor Antony Honoré, whose classic article on ownership was published more than fifty-years ago; by Seymour Drescher, Stanley Engerman, and Orlando Patterson who represent the historical study of slavery; and by Kevin Bales, who is the leading scholar and activist dealing with contemporary issues of slavery.[1] The Research Network sought to provide guidance to judges, prosecutors, juries, and defence counsel, as to the legal parameters of slavery so as provide legal certainty, thus ensuring the integrity of the legal process through fair trials, ensuring respect for the rights of the accused to know the charges against them.

The Research Network provided more than an interpretation of the 1926 definition of slavery; it provided an understanding of that definition which is applicable in a contemporary setting where slavery is no longer legally allowed. In so doing, it shows that the property paradigm of the 1926 definition does in fact capture the essence of slavery, be it contemporary or otherwise. To consider the work of the Research Network, it is first worth repeating the 1926 definition of slavery to give it emphasis:

> Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.

The focus was to try to understand what constitute those 'powers attaching to the right of ownership'. By unpacking this phrase it would be expected that the parameters of what was to be considered slavery and what is not would become evident. The research question was, if you wish: what powers does one exercise when they own a person? The answer it seems to me comes on two counts from Antony Honoré, Emeritus Regius Professor of Civil Law at Oxford University. First, in his seminal piece entitled 'Ownership', which appeared in the 1961 *Oxford Essays in Jurisprudence*, he develops, at the level of first principles, what constitutes ownership, by setting out its various instances. These various instance provided a framework for the approach of the Network in seeking to apply a property paradigm to slavery. Second, in an essay meant as his contribution to the Research Network, Professor Honoré considers the very notion of slavery from both a legal and philosophical perspective, pointing out that ultimately what we object to in slavery is the inability of a person to exercise their natural capacities when they find themselves in a "state of unlimited subordination to another individual".[2]

The link between that property paradigm and slavery is, in a word: *control*. In any situation of ownership, the owner controls the thing owned. This is normally understood a *possession*. Typically, possession means physical possession, but it will also mean the ability to control access to a thing; such as when a person possesses the content of their house by simply controlling access to that house by means of the front-door key. With this in mind, slavery should be understood as the ability of one person to control another as they would possesses a

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[1] Beyond these individuals, the Research Network was composed of Jean Allain, John Cairns, Holly Cullen, Paul Finkelman, Bernard Freamon, Allison Gorsuch, Richard Helmholz, Robin Hickey, Joel Quirk, Karlee Sapoznik, Jody Sarich, and Rebecca Scott.

[2] Antony Honoré, "Slavery – From Ancient to Modern", Jean Allain (ed.), *The Legal Parameters of Slavery: Exercising the Powers Attaching to the Right of Ownership*, 2012, pp. **XX**.

thing. Ownership implies such a background relationship of control. Where a slave is concerned, this control is tantamount to possession. It is control exercised in such a manner as to significantly deprive that person of their individual liberty. Normally, this control is exercised through violence, later through threats of violence or coercion, but may also emerge through deception and/or coercion. One need not physically possess a person, in the same way that one need not physically possess the contents of one's house; control tantamount to possession of a person goes beyond their physical control.

In the language of the 1926 definition of slavery, possession is one of the powers attaching to the right of ownership. To exercise possession over a person is a power attaching to the right of ownership. To exercise possession over a person is foundational to the concept of slavery. It is a hallmark of slavery. Slavery can only be present if possession is present; if control tantamount to possession is being exercised. It is foundation, as The International Guidelines on the Parameters of Slavery make plain – possession is a hallmark of slavery – because only if possession is exercised can any or all of the other powers of attaching to ownership be exercised. Thus, you cannot sell something, if you do not first possess it. In the same manner you cannot sell a person if you do not control them in a manner which is tantamount to possession. In a related manner, the ability to sell a person will be indicative of the presence of control tantamount to possession. A reversal of roles holds: possession allows for the ability to sell; selling indicates possession.

What then are the other powers attaching to the right of ownership? Well, the power *to buy or sell a person*: to involve a person as the object of a transaction *may* provide evidence of slavery. It is worth emphasising that it *may* provide evidence of slavery. It is sometimes said that athletes are slaves because they are bought and sold. While it may be true that their services are being bought and sold, such transactions fail to meet the threshold of slavery if there is a lack of control over the athlete which would amount to possession. While the football player having been sold to another club and 'forced' to move cities may deem it unfair; he will not be compelled to go under threats of violence. The athlete may not like it, but he can walk away. In cases of slavery, somebody is exercising control in such a manner as to significantly deprive the enslaved of their individual liberty; they are dictating what the enslaved is to do and backing up these dicta with violence either actual or latent. So, it is not enough to meet the threshold of slavery to say that a person has been bought or sold, though it may indicate that slavery is present. What is required is to first establish whether control tantamount to possession is present. The same would be true where other transactions involving human beings are concerned, such as bartering, exchanging, or gifting a person to another.

A further power attaching to the right of ownership is the ability to *use a person*. Again, one person can use another, but this need not amount to slavery. Nevertheless, such use may amount to slavery, if the background relationship of control is present to such an extent that it is tantamount to possession. By using a person, what is meant is deriving benefit from their service or their labour. In the case of slavery such benefit might be the saving incurred as a result of paying little or no salary for labour' or the gratification from sexual services. Closely associated with the use of a person, is the power attaching to the right of ownership manifest in the ability to *manage the use of a person*. In general terms, it goes without saying that to manage a person is not to enslave them. Division of labour is such that employers make legitimate decisions on a daily basis about the management of workers. Where it amounts to slavery is when there exists control tantamount to possession, and then management of the use of the slave takes place. Such management will include direct management, where, for instance, a brothel owners delegates

powers to a day manager in a case of slavery within the context of prostitution. It will also include more abstract management, where a person manages the use of a slave by isolating them from their previous social relationships, and forging a new identity of that person through the compelling of a new religion, language, place of residence and/or even forced marriage.

Beyond the case of both the management and the use of a person may be added the power attaching to the right of ownership: to *profit from the use of a person*. In the case of slavery this will be where a person, once control tantamount to possession has been established, money can be made from the use of the enslaved. Thus, the use of the slave is translated into the making of money for the owner, such profit might also entail the mortgaging of a person, being let for profit, or use as collateral. In concrete terms, this would mean that the slave is used and the money received from the toil of the slave, either their salary or the product of their labour, goes to their owner. Thus to exercise the power of profiting from the use of a person is a case of the enslavement of an agricultural worker would entail the establishment of control (ordinarily through violence, coercion and/or deception) which, over a thing, would amount to possession. Having established this control, the agricultural worker is made to harvest crops and the profit from that labour, along with the salary which was meant to go to the worker is appropriated by the owner.

A further power attaching to the right of ownership that is often thought to be less common, yet fits into the property paradigm is the ability to *transfer a person to an heir or successor*. In this situation it would be difficult to see how such a transfer would be able to take place without the background element of control tantamount to possession being in place. Regardless, such control would need to be present for such an inheritance to constitute slavery. Lest it be thought that such cases of inheritance are a thing of the past, they are not. There are a number of systematic cases of widow inheritance in various countries, which are customary practices attached to traditional marriages. The case of Igbo and Hausa-Fulani of Nigeria is instructive. Amongst these communities "widows are considered part of the estate of their deceased husband and, therefore, have no inheritance rights themselves", and as such, certain customary laws prescribe that a widow be 'inherited' by "a male relative of the former husband".[3]

In the language of property law, it is said that ownership can entail the ability to use up property; to exhaust a thing owed, to consume it. You can use a car until you run it into the ground; you can exhaust a pack-mule; you can consume food. In the case of slavery this power attaching to the right of ownership may be understood as the ability to *destroy a person*. Having established control tantamount to possession, slavery will be manifest where the disregard for the well-being of the person is evidenced by severe physical or psychological exhaustion which, if allowed to carry on to its logical conclusion, would entail the death of enslaved. In this case, the destruction of the person is a process of physical or psychological exhaustion; the person is broken and, over time, he or she grows frail, either in body or in mind.

A final power attaching to the right of ownership is worth mentioning, but more for its inapplicability to human beings then for its value in seeking to establish evidence of slavery taking place. With regard to what in property law is called 'security of holding', the owner of property can exercise a power attaching to the right of ownership against an attempt by the State to expropriate. Such security of holding will not mean that expropriatation is not allowed, but

[3] Immigration and Refugee Board of Canada, Nigeria: Levirate marriage practices among the Yoruba, Igbo and Hausa-Fulani; consequences for a man or woman who refuses to participate in the marriage; availability of state protection (February 2006), 16 March 2006, NGA101045.E; as found at RefWorld: 2006, NGA101045.E, available at: http://www.unhcr.org/refworld/docid/45f1478811.html.

rather that there is due process, a public interest, and that fair, market value, compensation will be provided. However, in a contemporary setting where individuals can no longer own slaves *de jure*; such ownership in slaves is not protected from expropriation by the State. The corollary is of course, that expropriation cannot take place because the State cannot then take over the deed of ownership over a person. Instead, where slavery is concerned one might think of an 'insecurity of holding', a duty on the State to 'expropriate'; to confiscate human beings being held in situations tantamount to possession so as to liberate them. What I am thinking of here is the positive obligation on the State to suppress slavery. In human rights law there is established, at minimum, a positive obligation to bring about the end slavery and to criminalise such enslavement.[4]

Having set out the various powers attaching to the right of ownership, one gets a sense of what will constitute slavery in law. Having established a background relationship of control which would amount to possession, the exercise of powers attaching to the right of ownership will include the buying, selling, using, managing, profiting and even the destruction of another person. In seeking to make a determination as to whether slavery exists in such a situation, it would be important to evaluate the specific circumstances and not make a judgment based on what the practice is called. This is important as there is confusion within the realm of human exploitation, as certain terms, such as 'slavery' and 'practices similar to slavery' are legal terms, whereas terms such as 'contemporary forms of slavery' and 'slavery like practices' are terms of art which have no legal currency. As result, it is best to look at the substance of the relationship and simply ask, is there an exercise of any or all of the powers attaching to the right of ownership.

Where one is asked to consider the distinction in law between say slavery and forced labour or slavery and one of the 'practices similar to slavery' (that is one of the servitudes set out in the 1956 Supplementary Convention: debt bondage, serfdom, servile marriage, or child exploitation); it may be best to start by the more serious of the offences and ask whether any or all of the powers attaching to the right of ownership are exercised in a given situation; if so, then slavery is present. In a case where between slavery and forced labour, slavery is not present, then one would look to the International Labour Organisation's 1930 Forced Labour Convention which establishes that "the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. If it can be demonstrated that in the case at hand a person has been compelled to work under a menace of a penalty and that they did not offer themselves voluntarily, then this will, in law, constitute forced labour. Likewise, in cases where the conventional servitudes found in the 1956 Supplementary Convention are at play; as between slavery and debt bondage, serfdom, servile marriage, or child exploitation; reference would first be made to the more serious of the offences and if the circumstances did not meet the threshold of the exercise of any or all of the powers attaching to the right of ownership reference would then be made to definition of these conventional servitudes as set out at Article 1 (a) to (d) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery so as to determine if the situation met a specific definitional threshold.

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[4] In the European context the positive obligations with regard to slavery are wider, as a result of the 2010 Rantsev case before the European Court of Human Rights. See *Rantsev v Cyprus and Russia*, Application no. 25965/04, 7 January 2010. Consider also: Jean Allain, "*Rantsev* v. *Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery", *Human Rights Law Review*, Vol. 10, 2010, pp. 546-557.

The Contemporary Relevance of the 1926 Definition of Slavery

Having provided a explanation up front of the manner in which the definition of slavery can be understood and applied in a contemporary setting, this Chapter now works backward, to further unpack the definition so as to demonstrate how, in fact, the 1926 definition has contemporary relevance. In other words, before we could consider what constituted the various powers attaching to the right of ownership, a more fundamental question had to be asked of the definition: does the 1926 definition only apply to situations of chattel slavery, to historical types of slavery where one owns – *de jure* – a slave? *De jure* slavery is, in other words, ownership in the legal sense, where a right of ownership could be vindicated in a court of law as regard to a dispute between two individuals claiming ownership over a slave. If the 1926 definition of slavery was only applicable *de jure* and not to *de facto* situations of ownership, then it would have little contemporary relevance and thus the elaboration of the content of the powers attaching to the right of ownership would be a moot exercise. But as we shall see, just as with illegal drugs or illegal weapons, one can exercise a power of attaching to ownership without actually owning such drugs or weapons in the legal sense. The question turned then on whether the wording of the definition of slavery found in the 1926 Slavery Convention allowed for an interpretation which gave it contemporary relevance.

It bears repeating that the definition of slavery found at Article 1(1) of the 1926 Slavery Convention states; 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised'. One would be led to believe that internationally the definition had contemporary relevance, as States negotiating the 1956 Supplementary Convention, reproduced the substance of the 1926 definition in their text. Likewise, in 1998, States negotiating the establishment of an international criminal court once more reproduced in substance the 1926 definition of slavery in the Statute of the International Criminal Court. In its 1998 version, the text sets out a definition of 'enslavement' under the heading of a crime against humanity. That definition reads:

> 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.[5]

I say, that the definition is 'reproduced in substance' as the latter half of the sentence does not add anything new to the substance of the definition; instead this is a common legislative tool used to bring to the attention of judges, prosecutors, etc., that they should pay attention to situations of trafficking, and in particular those instances where women or children are concerned. Thus, in international law the definition of slavery as first set out in 1926 is very much the definition accepted by States. But the question remained does it have contemporary relevance?

As late as 2005 the question was answered in the negative as the European Court of Human Rights in the *Siliadin* case. In that case, the Court, in considering the fate of a Togolese girl who had been exploited as a domestic worker by her French hosts, determined that both forced labour

[5] Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

and servitude had transpired in breach of Article 4 of the European Convention on Human Rights, but failed to find a case of slavery. By reference to the 1926 definition, the European Court stated that:

> this definition corresponds to the 'classic' meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object'.[6]

In might be added here that the Court has, by reference to its 2010 *Rantsev* judgment, moved away from its 2005 position, recognising, in the case of trafficking for the purposes of prostitution into Cyprus which had left a young Russian woman dead, that it "considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership", though there was no question of *de jure* ownership transpiring in this case.[7] f

A more thorough consideration of the definition of slavery has come about not via human rights courts, but through criminal courts where, I would argue, the process is much more rigorous as there are competing human rights at play: that of the prohibition against slavery verses the rights of the accused to know the charges against them. In this regard, the 2002 *Kunarac* judgement of the International Criminal Tribunal for the former Yugoslavia is instructive. In a case dealing with Serbian commanders in the ethnically-cleansed town of Foca, Bosnia-Herzegovina, who, in maintaining a detention centre, used it to regularly rape scores of Muslim women. With regard to this case, the Appeals Chamber accepted "the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership"[8]. The Appeals Chamber did not recognise that the definition applied only to cases of ownership – that is *de jure* ownership – of a person, as it stated that:

> The Appeals Chamber will however observe that the law does not know of a 'right of ownership over a person'. Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred.[9]

A further case which shines much light on the definition of slavery is the 2008 *The Queen v Wei Tang* case decided by the High Court of Australia. That case, which related to five Thai women sold and bonded into prostitutes in Melbourne, allowed the highest court in the land to consider whether the definition of slavery had contemporary relevance. In other words, whether the definition was applicable to cases of *de jure* slavery as the European Court of Human Rights intimated in its 2005 *Siliadin* judgment or whether it applied in *de facto* situations where a person did not legally own another person but instead exercised powers of ownership in a factual manner.

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6 European Court of Human Rights, *Siliadin v France* (Application 73316/01), 26 July 2005, para. 122.

7 European Court of Human Rights, *Rantsev v Cyprus and Russia* (Application 25965/04), 7 January 2010, p. 280.

8 International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, para. 117.

9 International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, paras. 118-119.

Before setting out the reasoning of the High Court of Australia in the *Tang* case, it might be worthwhile to take the reader through 'Treaty Interpretation 101'. The reference point for interpreting a provision like the definition of slavery is the 1969 Vienna Convention on the Law of Treaties, which provides guidance on all things related to international agreements, including how treaties should be interpreted. The general rule is that a provision of a treaty should be interpreted in good faith; one should look to the ordinary meaning of the words, considering them in their context (both in relation to other provisions of the treaty and to the treaty as a whole), and finally, that the interpretation should be made in light of the object and the purpose of the treaty. If the outcome of an interpretation, in the language of the Vienna Convention, "leads to a result which is manifestly absurd or unreasonable" or, more germane to our considerations: "leaves the meaning ambiguous or obscure", then "recourse may be had to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". These supplementary means are thus the legislative history of the negotiations, or in the parlance of international diplomacy: the *travaux préparatoires*. The final element of treaty interpretation found within the Vienna Convention relates to treaties negotiated in two or more languages. Where each of these texts is deemed authoritative, it may transpire that there exists a divergence between them. In such cases, and where the general rules and the supplementary rules of treaty interpretation do not eliminate the need, reference can be had to "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty". These, then, are the interpretive tools set out in the Vienna Convention which allow us now consider the definition of slavery as first set out in the 1926 Slavery Convention.

It will be recalled that the definition speaks of 'Slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised'. Turning first to consider the ordinary meaning of the terms: 'status or condition'. Among its various meanings, 'status' is a legal term; the *Oxford English Dictionary* defines status in the legal sense as: "The legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority".[10] Inference as to the term 'status' being used in the legal sense can be drawn from the *travaux préparatoires* where, for instance, it was noted that the "most important measure for the gradual abolition of slavery is that the status of slavery should no longer be recognised in the eye of the law".[11] In the definition of slavery, legal status is juxtaposed by the conjunction 'or' with the term 'condition' which may be deemed a "mode of being, state, position, nature". It is further described by the *Oxford English Dictionary* as a "characteristic, property, attribute, quality (of men or things)". While 'condition' has a legal meaning, that meaning is not relevant here, as it speaks of a condition as a prerequisite to, for instance, receiving of an inheritance on condition of the heir having reached the age of majority.[12] Thus, while 'condition' in the legal sense is not applicable in the context of the definition, the juxtaposition of it with regard to legal 'status' (that is: reading it 'in context'), accompanied by its ordinary meaning as being an attribute of a person, a mode of being; speaks to slavery in factual terms. Such a reading of the phrase 'status or condition', it might be noted was confirmed by the High Court of Australia in *Tang*, as it notes that "Status is a

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[10] *Oxford English Dictionary*, 1989, p. 437.

[11] League of Nations, Temporary Slavery Commission, Report of the Temporary Slavery Commission adopted in the Course of its Second Session, July 13th-25th July, 1925, A.19.1925. VI, 25 July 1925, p. 3.

[12] The *Dictionary* read "In a legal instrument, e.g. a will, or contract, a provision on which its legal force or effect is made to depend", i.e. "Something demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation". See *Oxford English Dictionary*, 1989.

legal concept. Since the legal status of slavery did not exist in many parts of the world, and since it was intended that it would cease to exist everywhere, the evident purpose of the reference to 'condition' was to cover slavery *de facto* as well as *de jure*".[13]

While it might be said that it is enough to base an understanding of the definition of slavery as being applicable in both *de jure* and *de facto* situations by reference to a reading of phrase 'status or condition', I would argue that the definition has two more elements which speak to this or confirm it. Both deal with the phrase: 'powers attaching to the right of ownership' found in the definition of slavery. With regard to the first element, it will be recalled that the Appeals Chamber of the International Tribunal of the former Yugoslavia noted that "the law does not know of a 'right of ownership over a person'"; but in fact the definition speaks of the exercise of the 'powers attaching to the right of ownership'. The phrase is a step removed from ownership. One does not need to own the thing, but instead exercise a power attaching to the right of ownership. In the context of the definition of slavery, it does not speak of having a right of ownership over a person – a legal right of ownership – but of exercising powers of ownership even when, for instance such ownership might be legally impossible. Here one might draw an analogy to a case of a kilogram of heroin. While a court will not determine a 'right of ownership' of the prescribed drug for this is impossible; it will ask: who exercised 'a power attaching to the right of ownership' such as possession and sentence accordingly. In this manner we see that the definition goes beyond the strict confines of the exercise of a right of ownership over person and instead speaks of the exercise of a power attaching to a right of ownership. Thus, the definition goes beyond a legal right of ownership (*de jure* ownership) and encompasses the exercise of such powers in *de facto* situations.

The second element touching on the phrase 'powers attaching to the right of ownership', turns on the difference in meaning found in the authentic French and English versions of the 1926 Slavery Convention. More specifically with regard to the phrase 'powers attaching to', which in the French text appears as '*les attributs*'. *Les attributs* can be translated to English literally so that the phrase would now read 'the attributes of the right of ownership'. As the object and purpose of the 1926 Slavery Convention, as noted in its preamble is "securing the complete suppression of slavery in all its forms"; the meaning of the term between 'powers attaching to' and '*les attributs*', which best reconciles the texts would appear to be one which allows for an expansive rather than a restrictive interpretation of the phrase. As a result, the French text appears, in speaking of the attributes of a right of ownership, to go beyond the legal and gives credence to the general and supplementary rules of treaty interpretation which speak to the definition of slavery going beyond the legal and being applicable also in situations of *de facto* ownership.

This interpretation of the definition of slavery, taking into consideration the rules of interpretation of the 1969 Vienna Convention of the Law of Treaties produces the same outcome which the High Court of Australia arrived at in the *Tang* case: that the definition of slavery has contemporary relevance as it is applicable not only in situations of *de jure* ownership, but also in situations where one does not own another person in a legal sense – as this is almost impossible today – but *in fact* exercises a power attaching to the right of ownership. Let us now turn to the *Tang* case in more detail.

In 2005, a Melbourne brothel owner of greater was found guilty of five counts of both "intentionally possessing a slave, and [...] of intentionally exercising over a slave a power attaching to the right of ownership". Thus in the Australian context, we witness the

[13] High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 13. Emphasis added

incorporation of the definition of slavery in its domestic legislation. The case revolved around five sex workers who had been escorted to Australia and each sold for AUS$ 20,000; that is to say, in the language of the buyers quoted by the High Court of Australia: "'the amount for this girl', 'the amount of money we purchased this woman' and 'the money for purchasing women from Thailand to come here'".[14] These women where then bonded through a debt of between AUS$ 42,000 and 45,000 related to their purchase, travel and accommodation expenses, to be repaid through sex work. In summary the Court noted that: "while under contract, each complainant was to work in the respondent's brothel in Melbourne six days per week, serving up to 900 customers over a period of four to six months. The complainants earned nothing in cash while under contract except that, by working on the seventh, 'free', day each week, they could keep the $50 per customer that would, during the rest of the week, go to offset their contract debts'.[15]

The reasoning in the *Tang* judgment is instructive in two manners; first the majority judgment of the Court, penned by its Chief Justice, Murray Gleeson, sets out the legal reasoning which demonstrated the contemporary relevance of the definition of slavery. Second, the concurring opinion of Kenneth Madison Hayne takes a different approach asking fundamental, normative, questions in seeking to understanding the applicability of the definition in a contemporary situation. Gleeson CJ. set out the reasoning of the Court on the contemporary relevance of the definition of slavery and its reading of the exercise of 'powers attaching to the right of ownership' as being applicable in *de facto* as well as *de jure* situations in the following manner. He notes that in 1926, many of the States party to the Convention had already abolished the legal status of slavery and that the declared object of the parties was to bring about 'the complete abolition of slavery in all its forms'. The Court continues:

> It would have been a pitiful effort towards the achievement of those ends to construct a Convention that dealt only with questions of legal status. The slave trade was not, and is not, something that could be suppressed merely by withdrawal of legal recognition of the incidents of slavery. It is one thing to withdraw legal recognition of slavery; it is another thing to suppress it. The Convention aimed to do both. [...]
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> In its application to the *de facto* condition, as distinct from the *de jure* status, of slavery, the definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible; not necessarily all of those powers, but any or all of them. [...] On the evidence it was open to the jury to conclude that each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants' labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants' labour without commensurate compensation.[16]

The Court went on to state that:

> It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term 'slave' is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. [...]An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement.

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14 High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 8.
15 High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 9.
16 High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 13. Emphasis added.

While the Court would go on to consider the textual make-up of the wording of the Australian Criminal Code and the determination of its lower Court of Appeal, it followed on its previous pronouncement by concluding that:

> Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.[17]

While Hayne J. concurred with the reasoning of Gleeson CJ, he considers the notion of 'ownership', stating that it "must be read as conveying the ordinary English meaning that is captured by the expression 'dominion over' the subject matter.[18] Where ownership is a legal relationship, Hayne J. relates, "An 'owner' has an aggregation of powers that are recognised in law as the powers permissibly exercised over the subject matter. It is a term that connotes at least an extensive aggregation of powers, perhaps the fullest and most complete aggregation that is possible". As ownership of a person is impossible in the Australian context, Hayne J. stated that "what the alleged offender has done must then be measured against a factual construct: the powers that an owner would have over a person if, contrary to the fact, the law recognised the right to own another person". In considers the powers attaching to a right of ownership, Hayne J. sees in possession the power of dominion over a person, he thus uses ownership and possession as being synonymous, stating that "possession, like ownership, refers to a state of affairs in which there is the complete subjection of that other by the first person". He the continues stating that:

> One, and perhaps the most obvious, way in which to attempt to give practical content to the otherwise abstract ideas of ownership or possession (whether expressed by reference to subjection, dominion or otherwise) i*s to explore the antithesis of slavery*. That is, because both the notion of ownership and of possession, when applied to a person, can be understood as an exercise of power over that person that does not depend upon the assent of the person concerned, it will be relevant to ask *why* that person's assent was irrelevant. Or, restating the proposition in other words, in asking whether there was the requisite dominion over a person, the subjection of that person, it will be relevant to ask whether the person concerned was deprived of freedom of choice in some relevant respect and, if so, what it was that deprived the person of choice.

Having turned to and considered the jurisprudence related to issues of slavery and 'involuntary servitude' in the United States of America, Hayne J. drew a number of insights, the first being that the American cases "show that some assistance can be obtained in the practical application of the abstract concepts of ownership and possession by considering the antithesis of slavery and asking whether, and in what respects, the person alleged to be a slave was free". Hayne J. then continues: "Asking what freedom a person had may shed light on whether that person was a slave. In particular, to ask whether a complainant was deprived of choice may assist in revealing whether what the accused did was exercise over that person a power attaching to the right of

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[17] High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 16.

[18] Hayne J., High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 60; follows by explains in more detail his understanding of dominion:

> As explained earlier, to constitute 'ownership', one person would have dominion over that other person. That is, the powers that an owner of another person would have would be the powers which, taken together, would constitute the complete subjection of that other person to the will of the first. Or to put the same point another way, the powers that an owner would have over another person, if the law recognised the right to own that other, would be powers whose exercise would not depend upon the assent of the person over whom the powers are exercised.

ownership".[19] As a result of this analysis, which gets us closer to understanding not the criminality of the accused but the deprivations of the victim, Hayne J. gets to the heart of the normative understanding of slavery and provides further guidance, beyond the majority judgement in *Tang*, as to the application of the definition of slavery in a contemporary situation.

The 1926 Definition of Slavery

Having worked backwards in the previous section to demonstrate the contemporary relevance of the definition of slavery manifest both in the wording of the definition and in the *Tang* case, thus grounding the opening section of this Chapter which considers the parameters of those powers attaching to the right of ownership, this section will now take one further step back to consider the very foundation of the definition. This section considers the genesis of the definition of slavery as well as the reasons why it failed to take hold and have relevance throughout much of the twentieth century. The final point is worth emphasising, as throughout the twentieth-century, the definition of slavery slipped further and further into obscurity, so that as the new millennium approached, its applicability also approached zero; only to be given new life at the dawn of the twenty-first century.

The definition of slavery, and the Slavery Convention itself, was developed within the context of a League of Nations which was a European colonialist club, seeking to end slavery beyond its membership while curbing the excesses of servile labour in the colonies. The genesis of the 1926 Slavery Convention emerges out of the provisions of Articles 22 and 23 of the 1919 Covenant of the League of Nations dealing with Mandate Territories, and more specifically those colonial possession of Central Africa which were transferred from the vanquished to the victors of the First World War. Article 22 states that among the responsibilities of the new Mandate holders was "the prohibition of abuses such as the slave trade"; while under Article 23, the Covenant required Members of the League of Nations to "endeavour to secure and maintain fair and humane conditions of labour for men, women, and children" as well as granting "general supervision over the execution of agreements with regard to the traffic in women and children". Action with regard to these provisions was first precipitated by a memorandum circulated by British member of the Permanent Mandates Commission, Sir Frederick Lugard, proposing that Ethiopia, an independent, non-Member State of the League, be placed under a Mandate for its inability to suppress the slave trade.[20] This led to a chain of events which not only saw Ethiopia join the League of Nations, but a move to established an instrument suppressing the slave trade, slavery and forced labour.[21] The League of Nations established a body of experts, the Temporary Slavery Commission whose work in 1924 and 1925 would be the DNA of the legal provisions related to forced labour, slave trade, slavery, and servitude as they would emerge over the next thirty years.

Where the 1926 Slavery Convention is concerned, while most of its provisions have been superseded by other obligations found in more recent treaties, what remains applicable are its definitions of both slavery and the slave trade. Where the slave trade is concerned, the Convention sets out the following definition:

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[19] Hayne J., High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 65.

[20] Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem*, 2003, p. 103.

[21] See Jean Allain, "Slavery and the League of Nations: Ethiopia as a Civilised Nation", *Journal of the History of International Law*, Vol. 8, 2006, pp. 213-244.

> The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

With regard to the definition of slavery, it will be recalled that Article 1(1) of the Slavery Convention reads: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised". That definition, while it was considered by a drafting committee, found its final form through the pen of Robert Cecil – Viscount Cecil of Chelwood.[22] Viscount Cecil, having considered feedback from States as to his proposed definition, reiterated his understanding of the definition of slavery as "the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things".[23] At the prompting of the Union of South Africa, Viscount Cecil made plain that unless a practice reached the threshold of the exercise of powers attaching to the right of ownership, it did not constitute slavery as defined by the 1926 Slavery Convention.[24] This point was brought home in 1936, when the League of Nations' Committee of Experts on Slavery considered the issue of serfdom, emphasising that one must make a distinction between slavery as defined in the Convention and other forms of exploitation:

> It is important, however, to keep the fundamental distinction clearly in mind, and to realise that the status of 'serfdom' is a condition 'analogous to slavery' rather than a condition of actual slavery, and that the question whether it amounts to 'slavery' within the definition of the Slavery Convention must depend upon the facts connected with each of the various systems of 'serfdom'[25].

The Committee of Experts on Slavery was more explicit in regard to its considerations of debt slavery, noting that at least theoretically:

> debt slavery is only a temporary form, for the assumption is that the slavery ends as soon as the debt is repaid. In practice, however, the conditions in which the debt-slave lives are often of the nature that repayment is an impossibility and the debtor is therefore a slave for life. Even worse than this may sometimes happen, for in some systems there are cases in which the debt is 'hereditary' and, after the death of the debtor, it is transmitted to the children and children's children. It is right, perhaps, that one should realise quite clearly that the system – *whatever form it may take in different countries –is not 'slavery' within the definition set forth in Article 1 of the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master*.[26]

Despite such an understanding of the definition of slavery, shortly after the establishment of Slavery Convention another stream emerged which sought to read into the definition of slavery an interpretation which went beyond its ordinary meaning so as to encompass lesser servitudes or

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[22] See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff, 2008, pp. 51-60.

[23] League of Nations, *Slavery Convention: Report presented to the Assembly by the Sixth Committee*, A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, pp. 1-2.

[24] See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff, 2008, pp. 76-79.

[25] League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, , LofN Doc. C.189(I). M.145.1936, VI,13-14 April 1936, p. 27.

[26] League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, , LofN Doc. C.189(I). M.145.1936, VI,13-14 April 1936, pp. 24-25. Emphasis added.

types of human exploitation.[27] While this had its genesis in abolitionist groups which had to reinvent themselves in the wake of the 1926 Slavery Convention, it reached its fullest expression during the United Nations era. In 1956, the United Nations adopted an instrument meant to supplement the 1926 Slavery Convention. Though originally meant to suppress various servitudes, for reasons related to the obligations to be undertaken and not to the normative standards set, the term servitude was dropped - instead we have the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. While the reasons for this change need not concern us here, what is important is the recognition that servitudes were now to be understood as 'institutions or practices similar to slavery' – or in its shorter form, as 'practices similar to slavery'.[28]

This is important, as 1956 was a water-shed for international relations. The previous year's Bandung Conference had created what would come to be known as the Non-Aligned Movement, while 1957 would see Ghana, the first Africa State gain its independence from European colonial powers. The decolonisation process would re-align the United Nations as the original 51 Member States would lose their democratic majority as new independent States would join the Organisation, lifting is current membership by a factor of four. This loss of dominance within the democratic bodies of the United Nations (re: excluding the UN Security Council), meant that newly independent states could set the agenda. Where slavery was concerned, that agenda related to the legacy of colonialism, including the African slave-trade; but more so, the *apartheid* regimes of Southern Africa which were seen as a contemporary manifestation of slavery. If not slavery, then at least servitude – that is, at least, in the language of the 1956 Supplementary Convention: 'a practice similar to slavery'.

Consider the main proponent of this approach, the Representative of the United Republic of Tanzania, Waldo Waldron-Ramsey, who in 1966 stated:

> the policy of apartheid followed by South Africa in its own territory and in South West Africa, by the racist, traitorous and illegal regime in the Colony of Rhodesia and the colonialist methods applied by the Portuguese Government in the so-called Portuguese territories of Mozambique, Angola, and Portuguese Guinea, were flagrant examples of slavery.
>
> It was manifest that the methods traditionally used by the colonialist must be regarded as practices similar to slavery.[29]

However, the advocacy of *apartheid* (and, to a lesser extent, colonialism) as slavery or as a practice similar to slavery was not accepted by the old guard. Despite having lost their majority in the United Nations, the original members of the United Nations held enough seats to be gate-keepers of international law, as the route to establishing a new norm through treaty law was via an international conference which procedurally, required two-thirds majority throughout. For newly independent States, the numbers did not add up. As a result, the link between slavery or practices similar to slavery on the one hand and apartheid or colonialism on the other hand, could not be sustained in legal terms. As a result, Waldron-Ramsey changed tact – though he was not happy – and ultimately, what would emerge from the UN Economic and Social Council was a

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[27] See for instance, the International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia. 8 September 1930.

[28] For those interested in a fuller elaboration of why we went from servitude to 'practice similar to slavery, see Jean Allain "On the Curious Disappearance of Human Servitude from General International Law", *Journal of the History of International Law*, Vol. 11, 2009, pp. 303-332.

[29] United Nations, Economic and Social Council, Social Committee, Summary Record of the Five Hundred and Thirty-Sixth Meeting, 7 July 1966, UN Doc E/AC.7/SR.536, 14 December 1966, p. 5.

compromise found in a 1966 Resolution which would see the creation of a term, not of law, but of art – a political term – which would gain much currency in the United Nations system. [30] That Resolution decided "to refer the question of slavery and the slave trade in all their practices and manifestations including the *slavery-like practices* of apartheid and colonialism, to the Commission on Human Rights".[31] This term would add a layer of confusion to the regime of human exploitation, beyond that of 'servitude' being replaced by 'practice similar to slavery' in the 1956 Supplementary Convention; as we now had the term 'slavery-like practices' which was a near replica of the legal term 'practice similar to slavery'.

Having sowed confusion by this nomenclature, from 1966 onwards, any momentum which might have been generated in addressing issues of slavery was lost. It might be noted, as Suzanne Miers has, that the emphasis on *apartheid* and colonialism by newly independent States deflected attention away from its "entrenched customs", such as child marriage and widow inheritance, which were legislated against in the 1956 Supplementary Convention.[32] The confusion, would lead to a loss of direction most evident in the work of the United Nations Working Group on Contemporary Forms of Slavery (1975-2006) which, by the end of its tenure had overseen the collapse of the applicability of slavery at the international level. The Working Group failed to grasp the distinction between the political and the legal, utilising the term 'slavery-like practice' to mean provisions under the 1956 Supplementary Convention coining the phrase 'contemporary forms of slavery' which went beyond the definition of slavery to include situation which moved quite far away from the legal. Under the heading of 'contemporary forms of slavery', the Working Group considered a number of social ills, including trafficking in persons, exploitation of prostitutes (in 1989); child pornography, children in armed conflict (1990); child soldiers (1991); removal of organs (1992); incest (1993); migrant workers, sex tourism (1994); illegal adoption (1996); early marriages, and detained juveniles (1997). Much of its considerations strayed very far from the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

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[30] Consider Mr Waldron-Ramsey words as the Greek representative proposed that conference be convened to settle the issue:

> The Committee was not asked to go back to the 1926 or 1956 Conventions, to which the Greek representative had referred, but to deal with slavery in 1966. Some delegations interpreted the notion of slavery in a limited technical sense and were endeavouring to restrict its definition to suit their own ends; he was not fooled by their humbug.
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> They drew attention to the slavery alleged to exist in India and Pakistan where it was supposed to result from traditional debtor-creditor relationships, or in the High Andes of Peru and Bolivia, where it was said to stem from landlord-tenant relationships. In point of fact there was no slavery either in those Asian countries or in Latin America, but slavery undoubtedly existed in the African counties he had mentioned [re: South Africa, Rhodesia, etc.].
>
> Similarly, it had been claimed that forms of slavery were to be found in certain Islamic customs, particularly polygamy. He protested against such allegations which were designed purely to camouflage other motives. Forms of bondage similar to slavery might be said to exist in certain European and American countries particularly in the Anglo-Saxon countries where prostitution and drug addiction were rife, as he remembered from the time when he had practised as a barrister in London.
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> Nor could the question of racialism be excluded, for it was the direct corollary of slavery. In his opinion, the classic definition of slavery he had given should either be accepted or extended to include all related manifestations of it without exception.

United Nations, Economic and Social Council, Social Committee, Summary Record of the Five Hundred and Thirty-Sixth Meeting, 7 July 1966, UN Doc E/AC.7/SR.536, 14 December 1966, p. 5.

[31] United Nations, Economic and Social Council, Social Committee, Slavery, Algeria, Gabon, Cameroon, Iran, Iraq, Morocco and the United Republic of Tanzania: draft resolution, UN Doc E/AC.7/L.492, 14 July 1966. Emphasis added.

[32] Suzanne Miers, *Slavery in the Twentieth Century*, 2003, p. 362.

Where the legal came into play, and the definition of slavery gained some traction which would lead to its contemporary application was the move internationally, within the realm of international criminal law. Towards the end of the twentieth-century what emerges is a 'Neo-Abolition Era' one which, like its predecessor is based on religious convictions which are backed by coercive legislation imposed by the most dominant State of the era. Thus we see a repeat of history: Just as Quaker activism and Anglican evangelicalism laid the foundation for the British abolitionist campaign which would first end the transatlantic slave trade and, in its wake, lead to the end of the slave-trade on land and the abolition of slavery; so too should we acknowledge the role of the 'Religious Right' in the United States of America and its influence on the American Congress in passing the 2000 *Victims of Trafficking and Violence Protection Act*.[33] Likewise, British dominance of the seas during the nineteenth century allowed it to force a network of bilateral 'right to search' treaties which effectively authorised it to police the seas, controlling commerce in such a manner as to force the end of the slave-trade at sea; so too has the *Victims of Trafficking and Violence Protection Act* and its progeny forced States – by threatening non-complying States with the prospect of losing foreign aid, multilateral assistance including the US voting against such States at the World Bank and IMF – to implement domestic legislation criminalising the trafficking of people.[34]

While the United States may consider itself the enforcer; it is enforcing international criminal law in the guise of an international instrument, as its anti-trafficking legislation is based on the United Nations' 2000 Palermo Protocol – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The Palermo Protocol sets out a definition of trafficking in persons which, in essence, renews obligations previously undertaken to suppress – most important for our purposes – slavery, but also other types of exploitation domestically. Article 3(a) of the Protocol reads:

> 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

The dominant position which the United States of America holds has allowed it, through informal empire, to require States to pass legislation that criminalise the trafficking of persons for various purposes including slavery. Just as in its most recent legislation, *William Wilberforce Trafficking Victims Protection Re-authorization Act of 2008*, the original 2000 legislation makes it "the policy of the United States not to provide non-humanitarian, nontrade-related foreign assistance to any government that (1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance

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[33] See Christopher Leslie Brown, *Moral* Capital, 2006; and Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade", *Politics Society*, Volume 35, 2007, pp. 447-475.

[34] See Jean Allain, "Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade", *British Yearbook of International Law*, Vol. 78, 2008, pp. 342-388; and Section 110, United States, Department of State, *Victims of Trafficking and Violence Protection Act*, 28 October 2000.

with such standards".[35] As a result, States have turned their thoughts to slavery as a criminal offence in ways they had not during the twentieth century.

Further, the emergence of slavery in legal terms has also benefited from the criminal law paradigm as a result of the development of international criminal law manifest primarily in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac* case and the establishment of the crime against humanity of enslavement in the Statute of the International Criminal Court. In *Kunarac* case, the Appeals Chamber determination of enslavement was "based on the exercise of any or all of the powers attaching to the right of ownership"[36]. This reference to the definition of slavery and the willingness to utilise in international criminal law was confirmed by its inclusion in the 1998 Rome Statute – The Statute of the International Criminal Court – which established the crime against humanity of enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".[37] That definition is supplemented by the secondary legislation of the Court, its 2002 Elements of Crimes which seeks to give more flesh to the bare bones of the crimes as set out in the Rome Statute. Where enslavement is concerned the Elements of the Crimes, set out the following, inter alia:

> The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[38]

That provision brings us full circle as it provides a short list of the 'powers attaching to the right of ownership' considered in the opening section of this Chapter, while pointing to the fundamental element of slavery: that of the loss of personal liberty of the victim ... though it might be added where it reaches the threshold of control tantamount to possession.

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[35] Section 110, United States, Department of State, *Victims of Trafficking and Violence Protection Act*, 28 October 2000.

These minimum standards related to legislating criminal liability for those involved in trafficking in person and requires that the State "should make serious and sustained efforts to eliminate severe forms of trafficking in persons".[35] As the Trafficking in Persons Interim Assessment Report of 5 April 2011, the US Department of State has placed fifty-eight States on its Special Watch List, as it was deemed that these States, *inter alia*: "(a) had a very significant or significantly increasing number of trafficking victims, [and] (b) had failed to provide evidence of increasing efforts to combat TIP from the previous year. [...]".See: United States, Department of State, Trafficking in Persons Interim Assessment Report, 5 April 2011, http://www.state.gov/g/tip/rls/reports/2011/160017.htm.

[36] International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, para. 117.

[37] Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

[38] International Criminal Court, Assembly of States Parties, Elements of the Crimes, ICC-ASP/1/3, 9 September 2002, p. 117.

Note that attached to this Element of the crime against humanity of enslavement is a footnote which reads:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Conclusion

The Palermo Protocol and the Statute of the International Criminal Court are fundamental to understanding the emergence of the legal definition of slavery into the twenty-first century. This is so, as a majority of States – that is: over a hundred States – have had to bring their domestic legislation into conformity with their international obligations by ensuring that slavery is criminalised. In so doing, and with the possibility of the International Criminal Court looking into issues of systematic enslavement within a country and the United States tying aid to foreign countries to suppressing trafficking of persons for the purposes of, amongst other things, slavery, it goes a long way to explaining the emergence of our contemporary Neo-Abolitionism Era. Having considered the genesis of the definition of slavery from the League of Nations through the United Nations era, a sense emerges as to why it was not utilised throughout most of the twentieth century. The *Tang* judgement flows from the criminal law side of the equation and truly engages with the definition of slavery by reading into the 1926 definition contemporary relevance. Having determined that the definition of slavery holds not only in *de jure* situations but also *de facto* situations, the Research Network as noted in the first section of this Chapter, took it upon itself to elaborate the International Guidelines on the Legal Parameters of Slavery which flesh out the exercise of powers attaching to the right of ownership in situations of slavery. The fundamental understanding of the definition of slavery then, if Olaudah Equiano, Abraham Lincoln or William Wilberforce were interested, is the controlling of another person as one would possess a thing. Having established such control, the powers attaching to the right of ownership will included the buying, selling, use, management, profit, transfer, or even the destruction of a person held in slavery.